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SERVICE DATE – LATE RELEASE FEBRUARY 6, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION—ACQUISITION EXEMPTION—CERTAIN ASSETS OF BNSF RAILWAY COMPANY

Decided: February 3, 2006

On December 6, 2005, New Mexico Department of Transportation (NMDOT), an agency of the State of New Mexico and a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from BNSF Railway Company (BNSF) certain right-of-way and trackage, totaling approximately 297.1 miles in Valencia, Bernalillo, Sandoval, Santa Fe, San Miguel, Mora, and Colfax Counties, NM, and Las Animas County, CO. The rail line extends between milepost 932.1 in Belen, NM, on BNSF's El Paso Subdivision and milepost 635.0 in Trinidad, CO, on BNSF's Raton Subdivision.

Notice was served on January 9, 2006, and published in the Federal Register on January 10, 2006 (71 FR 1584). Simultaneously with its notice, NMDOT filed a motion to dismiss the notice, asserting that the transaction is not subject to Board regulation because NMDOT will not become a common carrier as a result of the transaction. There is no opposition to the motion. The motion to dismiss will be granted.

BACKGROUND

NMDOT states that, pursuant to a draft purchase and sale agreement between the parties, BNSF would in three separate phases convey to NMDOT the right-of-way, track, and other real property and assets associated with the line, subject to BNSF's retention of a permanent, exclusive freight railroad operating easement. NMDOT states that it would not acquire any rights from BNSF to act as a common carrier and would not be providing service over the line.

NMDOT states that it plans to acquire the line for the purpose of providing commuter rail operations, and that it would not acquire the right or obligation to conduct freight rail service of any kind over the line. NMDOT states that, concurrently with the parties' purchase and sale agreement, BNSF and NMDOT would enter into a joint use agreement governing their respective operations on the line. The joint use agreement provides that: (1) NMDOT would take over responsibility for track maintenance upon acquisition of each segment of the line; (2) BNSF would continue to dispatch all trains

operating on the line until after closing on the third phase of the acquisition, at which time NMDOT would have the right to take over dispatching; and (3) commuter service would have priority over freight service during defined operating windows, but only so long as BNSF retained the ability to provide its freight service and Amtrak service was provided in accordance with statutory and contractual standards.¹

NMDOT maintains that its acquisition does not constitute an acquisition of a railroad line subject to the Board's jurisdiction. According to NMDOT, because it has not acquired the property and contractual rights necessary to conduct or control common carrier freight rail operations on the line, it has not become a rail carrier providing transportation subject to the Board's jurisdiction. NMDOT cites a number of cases in support of its position that this transaction is not subject to Board regulation.²

DISCUSSION AND CONCLUSIONS

The question here is whether the Board's regulatory approval is required for NMDOT to acquire the subject line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. 10901, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is not required, however, when the common carrier rights and obligations that attach to the lines will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

The record shows that BNSF would not be transferring common carrier rights or obligations and that NMDOT would not hold itself out as a common carrier performing rail freight service. The agreements between NMDOT and BNSF show that NMDOT would acquire only the physical assets but not the contractual rights necessary to conduct, control or interfere with common carrier freight operations on the line. BNSF would continue to provide its freight service over the line. Under these circumstances, we find

¹ NMDOT attached to its motion draft copies of the purchase and sale agreement, a quit claim deed, and the joint use agreement.

² Status of Bush Universal, Inc., 342 I.C.C. 550 (1973); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374, et al. (STB served July 23, 1996); United States v. California, 297 U.S. 175, 181 (1936); Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine); State of Georgia, Department of Transportation—Acquisition Exemption—Georgia Southwestern Railroad, Inc., STB Finance Docket No. 33876 (STB served July 7, 2000); State of Georgia, Department of Transportation—Acquisition Exemption—South Carolina Central Railroad, Inc., STB Finance Docket No. 34057 (STB served Apr. 30, 2002); and State of Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002).

that NMDOT would not become a rail carrier subject to the Board's jurisdiction as a result of the transaction. Therefore, this transaction does not require Board authorization, and NMDOT's notice of exemption will be dismissed and this proceeding will be discontinued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NMDOT's motion to dismiss its notice of exemption is granted.
2. The proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Commissioner Mulvey.

Vernon A. Williams
Secretary